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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 207

RETAIL CLERKS UNION, 1550
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO, *et al.*, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

THE KROGER CO., *Intervenor*

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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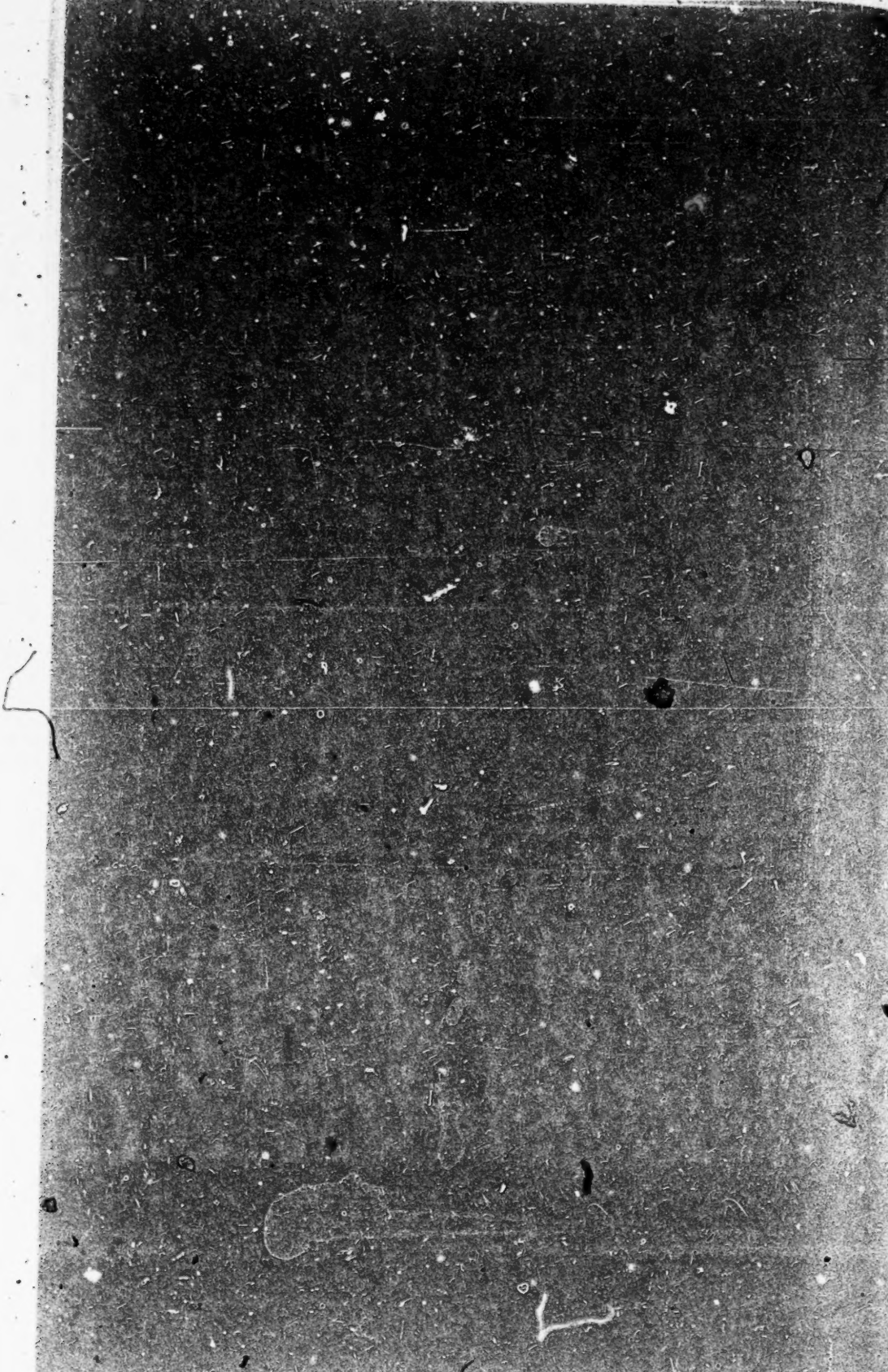

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
A. The Board's Findings of Fact	3
B. The Board's Decision and Order	7
C. The Decision of the Court of Appeals	8
Reasons for Granting the Writ	8
Conclusion	16
Appendix A	1a
Appendix B	1b

CITATIONS

Cases:

Anderson Lithograph Co., 129 N.L.R.B. 920 (1959) *enforced sub nom*	fn 10
Belleville Employing Printers, 122 N.L.R.B. 350, 353	fn 10
Buffalo Linen Supply Co., 109 N.L.R.B. 447, 449	9, 11, 13
Cohn-Goldwater Mfg. Co., 55 N.L.R.B. 1164	13
Detroit Window Cleaners Union, 126 N.L.R.B. 63 (1960)	fn 10
Fairbanks Dairy, 146 N.L.R.B. 111	13

Furniture Employees Council, 96 N.L.R.B. 1002.. 13

Hazel-Atlas Glass Co., 59 N.L.R.B. 706 13

Kasco Trucking Corp., 133 N.L.R.B. 627 (1961)..fn 10

Morgan Linen Service, Inc., 131 N.L.R.B. 420....fn 10

N.L.R.B. v. *Brown*, Certiorari Granted January 7, 1964, 32 L.W. 3243, No. 558 October Term, 1963 15

N.L.R.B. v. *Jeffries Banknote Co.*, 281 F.2d 893 (C.A. 9) .....fn 10

N.L.R.B. v. *Truck Drivers Local No. 449*, 353 U.S. 87, 95 .....8, 10, 12, 15

Northern Nevada Chapter, Inc., 131 N.L.R.B. 550, 552 fn. 3 .....fn 10

Pacific Coast Association of Pulp and Paper Manufacturers v. *N.L.R.B.*, 304, F.2d 760 (C.A. 9) 14

STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Section 8(a)(1) 7

Section 8(a)(5) 7, 12

Section 8(b)(3) 12

Section 10(e) 2

MISCELLANEOUS:

Collective Bargaining Structure; The Employer Bargaining Unit, BLS Rep., p. 10 ..... fn 9

Major Union Contracts in the United States, 1961, U.S. Department of Labor, BLS Bul. No. 1353, p. 4 ..... fn 9

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Petitioners pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the District of Columbia Circuit affirming an order of the National Labor Relations Board and denying a petition to set aside said order and remand the cause to the Board.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (J.A. 388-395)[1], including the Intermediate Report

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[1] All record references are to be the Joint Appendix filed in the Court of Appeals.

of the Trial Examiner (J.A. 396-507), is reported at 141 NLRB 564 (1962). The opinion of the court of appeals (App. A, *infra.*, pp. 1a-12a) is reported at 330 F. 2d 210.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964. On April 9, 1964, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act as amended.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board could properly find that when an employer is a member of a multi-employer bargaining unit, he may nonetheless refuse to execute a contract agreed to by the other employer-members of the unit and unilaterally insist upon separate negotiation of a particular mandatory subject of bargaining.

2. If the first question is answered affirmatively, whether the Board properly concluded that a number of mutually consented to post-contract adjustments of jointly-negotiated contracts, in order to accommodate those contracts to specialized conditions which were not of general concern to all the employer-members of the group, gave rise to a prerogative permitting any employer-member to unilaterally insist upon individual negotiation of any mandatory bargaining subject.

3. If the first two questions are answered affirmatively, whether the Board properly concluded that at the commencement of bargaining an employer's statement of opposition to, or lack of interest in, a union's substantive

contract demand constitutes a timely notice of intent to withdraw the subject from joint negotiation.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix B, *infra.* p. 1b.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT.

1. The bargaining history of the multi-employer group.

Since 1945 petitioners (collectively referred to hereinafter as the "Union"), who are local labor organizations representing food store employees, have bargained jointly with the principal retail food industry employers in the Chicago area, including Kroger (J.A. 389, 405; 10-11). While the employers bargained as a group they were not joined in any formal association, nor did they elect officers or formulate by-laws to govern the multi-employer bargaining.

The negotiations followed a fixed pattern which evolved over the years. During the early contract meetings, which were exploratory in nature, each union and each employer would have at least one representative present (J.A. 389). At all meetings, both groups acted through a spokesman or chairman. For many years a Kroger representative acted as employer spokesman (J.A. 389). As negotiations progressed, sub-committees would be formed by each group to carry on negotiations to their ultimate conclusion. Subcommittees would consist of as few as two or three members on each side and would negotiate for all employers and locals (J.A. 16-17). From time to time the employers would caucus among themselves, discuss the union's proposals and formulate a common response. Their differences,

if any, were settled in their private meetings and a common point of view was always expressed in negotiation (J.A. 389).

The negotiations always resulted in the execution of separate but substantially identical contracts by the respective employers and local unions (J.A. 390, 405). At no time during the 17-year history did any employer request withdrawal or, in fact, withdraw prior to the commencement of negotiations or during the negotiations. At no time until 1962 did any employer claim the right to reserve to individual bargaining any subject of group bargaining (J.A. 401). In isolated instances, thirteen in number over the seventeen year bargaining history, after the union and the multi-employer group had agreed to contract terms, individual employers and local unions, by mutual consent, adjusted the negotiated group contract to reflect special circumstances of no concern to the other employer members (J.A. 390-391).

For example, in 1952, Kroger and the locals representing its employees orally agreed to exclude "co-managers" where the contract's union security provisions excluded in general language "employees in a supervisory or executive capacity" (J.A. 391; 111-112, J.A. Vol. 2, pp. 118, 125, 130, 133); in 1956 after the contract had been executed by each of the employers, Kroger and the union agreed to a "pretty reasonable interpretation" of the contract phrase "regularly employed", which was otherwise not precisely defined, to mean employees who had worked a period of four weeks (J.A. 391; 164-165, J.A. Vol. 2, p. 241); in 1955, Kroger and Local 1640 agreed to modify the group contract to provide for dues check-off at a single Kroger store in Gary, Indiana because the union was having difficulty collecting dues in that particular store (J.A. 391; 102, 386-387); in 1958 National Tea negotiated a supplement to the 1957 group contract with respect to the laundering of uniforms for female employees

which differed inconsequentially from the provision on the same subject in the contract executed by the other employers (J.A. 392; 63-64, J.A. Vol. 2, pp. 209, 218, 225, 230);[2] the unions agreed to drop the "Bakery Department Head" classification from the 1954-56 contract with A & P, from the 1957-1959 contract with National Tea, and from the 1959-1961 contract with Kroger, while maintaining the classification with Associated Food Retailers (J.A. 393; 40, 73, J.A. Vol. 2, pp. 187, 195, 204, 222, 228).[3] In March, 1956, during the term of the then-existing contract, Local 1453 requested Kroger to vary the terms of the contract and to pay its members time-and-a-half for work after 6 p.m. (J.A. 393). Local 1453 made the same request to other employers, but when Kroger refused to consent to the change no variation in the contract was effectuated (J.A. 166).

2. The 1961-1962 contract negotiations

As in the past, the negotiations were preceded by the mailing of the union's uniform proposal to each employer. The proposal included a pension plan to be supported by

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[2] The separate negotiated provision in the National Tea contract provided (J.A. Vol. 2, p. 209):

> The company shall furnish the required uniforms to female employees but the employee shall be personally responsible for the uniform thereafter, including laundering and maintenance and shall return such uniform to the company upon termination of employment, if so requested.

The provision contained in the other employers' contracts stated (J.A. Vol. 2, pp. 218, 225, 230):

> Where dacron or similar type uniforms are furnished to female employees, such uniforms shall be laundered by the employee.

[3] In each instance, the unions agreed to drop the classification when the individual employer ceased to operate an unwrapped bakery goods department in its stores, thereby rendering the classification obsolete (J.A. 31-32, 180). Associated Food Retailers continued to operate unwrapped bakery departments and to employ persons in the "Bakery Department Head" classification (J.A. 31-32).

employer contributions to a jointly-administered fund (J.A. 198-210). At the first meeting, the Kroger representative stated that both Kroger and A & P were "not interested" in the pension proposal since each chain "had our own pension programs" (J.A. 402). During the course of the next several months of bargaining, the employers on two separate occasions presented the union with counter-proposals which did not include pensions and orally advised the union that the industry was opposed to pensions (J.A. 48-49, 50, 141, 212-230). When Kroger stated that it had never entered into a collective bargaining agreement containing a pension provision, the union replied that it intended a uniform settlement on an industry basis and that Kroger was bound by the results of the joint negotiations (J.A. 75-76).

At the twelfth bargaining session, on February 22, 1962, employer-spokesman Quirk stated that the industry might offer a proposal covering pensions which would not include all employers. The union repeated its earlier statement that it was negotiating a uniform industry agreement (J.A. 79-80). Quirk then suggested that the Kroger representative, who was not present at the meeting, be given an opportunity to state his position. At the next meeting the Kroger representative declared that Kroger would not agree to any contract which included a pension plan. He stated that while Quirk was authorized to negotiate for Kroger on other matters, the authorization would not include the subject of pensions (J.A. 403). The union representatives stated their disagreement with Kroger's position and the next morning the other members of the employer group reached agreement with the union on a contract containing a pension provision. The Kroger representative then stated that his company did not feel bound by the agreement and proposed as a basis for settlement with Kroger the industry agreement minus the pension provision. The union advised Kroger that it was negotiating on an industry-wide basis, that it intended the settle-

ment to apply to all employers and that it did not wish to negotiate a separate agreement with Kroger (J.A. 83-84, 127-128). On April 12, all employers, with the exception of Kroger, signed the agreement (J.A. 68-69).

B. The board's decision and order

Upon the foregoing facts, the Board, in agreement with the result reached by the Trial Examiner, found that Kroger did not violate Section 8(a)(5) and (1) of the Act by refusing to sign the contract agreed to by the other employers and by insisting upon separate negotiation of the union's pension proposals (J.A. 394). The Board concluded that Kroger and the union negotiated in 1961-1962 with the clear understanding that Kroger would not be bound by the results of joint negotiations and would be privileged to insist upon separate bargaining of any issue. The Board predicated this conclusion upon what it termed Kroger's having "made clear from the outset that it would not agree to a pension plan even if other employers did so agree" and the history of individual modifications in the joint agreements (J.A. 394). In the Board's view, in refusing to be bound by the agreement reached by the other employers with the union, Kroger was merely exercising "a prerogative established by past practice." Accordingly, the complaint was dismissed. The Board found it unnecessary to decide whether or not Kroger's actions precluded a finding that the appropriate unit for bargaining was the multi-employer unit (J.A. 395). For the purpose of decision, the Board's opinion assumed the existence of a multi-employer unit.[4]

[4] Absent an assumption that a multi-employer unit was appropriate, it would have been unnecessary for the Board to determine that Kroger had a prerogative to insist upon individual negotiation of the pension proposal. In its brief to the court of appeals, p. 14, the Board acknowledged that a unit determination "is a necessary predicate to a finding of a Section 8(a)(5) violation" and that the Board "assumed for the purpose of its decision herein that the multi-employer unit alleged as appropriate in the complaint was appropriate for the purposes of collective bargaining."

C. The decision of the court of appeals

The Court of Appeals for the District of Columbia affirmed the decision of the Board. Like the Board, the court found that the instances of "individual modifications" disclosed the mutual understanding that any party to the joint negotiations could insist upon individual negotiations on any subject. However, the court reasoned that Kroger had to exercise its prerogative of insisting upon individual bargaining "by timely action taken in good faith." The Court stated:

> "Had Kroger sat through the joint sessions with no intimation of its purpose with respect to pensions, we would have a different case. This would be especially true if the course of the negotiations suggested that the Union might have been weakening or trading off some of its other demands in the hope of getting agreement on pensions. One may not seek the benefits of joint bargaining without risking exposure to the burdens."

The court concluded that Kroger was relieved of the burdens imposed upon it by joint bargaining because at the outset of negotiations, it expressed its opposition to a jointly administered pension plan and never waivered from this position during the course of negotiations. The court found that its opposition to pensions was taken in good faith and that it did not mislead the unions as to its "position on the question of whether the group could bind it on the pension issue."

REASONS FOR GRANTING THE WRIT

1. This Court has recognized that multi-employer bargaining is "a vital factor in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining." *N.L.R.B.* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 95. Since that time it may be fairly estimated that the number of employees covered by collective bargaining agreements negotiated with multi-employer

groups has increased significantly.[5] In *Truck Drivers*, the Court affirmed the Board's balancing of the competing employer-employee interests presented there in favor of the employers' defensive tactics of locking out their employees when threatened with whipsaw strikes. The Board grounded its decision upon the employers' need to utilize the lock-out as a means of withstanding union economic pressure intended to destroy the integrity of the multi-employer unit. In the Board's view, the unit's integrity in turn rested upon "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship." *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 448. In its brief to this Court in *Truck Drivers* (pp. 23-26), the Board argued that employer solidarity in the form of multi-employer bargaining was worthy of preservation against the divisiveness of whipsawing because the employer members of the group have "one contract to administer"; by "presenting a common front on bargaining issues employers are better able to obtain uniform agreement . . . and thus prevent union exploitation of differences among them"; by negotiating as one they "preserve the unity which is the purpose of bargaining as a group"; and finally, multi-employer bargaining is "an effort by the employers to standardize employment conditions." Recognizing the validity of the Board's argument when presented

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[5] In *Truck Drivers*, the Court noted that in 1956 approximately 4 million employees were covered by such contracts. In 1961, a sample of 1,733 major agreements (i.e. contracts covering one thousand or more workers) covering only 8.3 million of the 18 million employees working under union-negotiated contracts disclosed 1,619 multi-employer agreements encompassing 3.9 million workers. *Major Union Contracts in the United States*, 1961, U.S. Department of Labor, BLS Bul. No. 1353, p. 4. Countless thousands of smaller employers engage in multi-employer bargaining. In the Retail Clerks International Association alone, it has been estimated that between 60% and 79% of its membership is represented under multi-employer agreements. *Collective Bargaining Structure; The Employer Bargaining Unit.* BLS Rep., p. 10.

in that context, the Court noted that employer-members of a multi-employer bargaining group have a legitimate interest in the group's preservation, for it exists "as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from non-uniform contractual terms." *N.L.R.B.* v. *Truck Drivers, supra,* at 96.

In conformity with *Truck Drivers,* the Board has since consistently held that an essential element of a multi-employer bargaining unit is an unequivocal manifestation between individual employers, either by express agreement or implied by their conduct, of an intent to be bound in future collective bargaining by group rather than individual action.[8] In the instant case, as affirmed by the court of appeals, the Board's erosion of that standard constitutes a radical departure from the concept of multi-employer bargaining which underlay the Court's decision in *Truck Drivers.*

At issue here is whether an employer-member who chooses to continue as a member of a multi-employer bargaining unit may nonetheless insist upon individual negotiation of a particular mandatory subject of bargaining. We submit that the two courses of action are mutually inconsistent, thus requiring that the case be remanded to the Board. In *Anderson Lithograph, supra,* at 920, the Board held that to permit an employer-member to "qualify or reject an agreement made by the multi-employer group with which he was affiliated would render the widely recognized practice of multi-employer bargaining virtually valueless." Assuming *arguendo* that on this record a pre-

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[8] *Anderson Lithograph Co.,* 124 N.L.R.B. 920 (1959), *enforced sub nom, N.L.R.B.* v. *Jeffries Banknote Co.,* 281 F.2d 893 (C.A.) 9; *Kasco Trucking Corp.,* 133 N.L.R.B. 627 (1961); *Detroit Window Cleaners Union,* 126 N.L.R.B. 63 (1960); *Walker Electric Co.,* 142 N.L.R.B. No. 134; *Belleville Employing Printers,* 122 N.L.R.B. 350, 353; *Morgan Linen Service, Inc.,* 131 N.L.R.B. 420; *Northern Nevada Chapter, Inc.,* 131 N.L.R.B. 550, 552 fn. 3.

rogative to insist on individual negotiations was established by past practices, the Board reaches two basically inconsistent conclusions. The Board holds on the one hand that a multi-employer bargaining unit existed, and on the other hand permits the negotiation of contracts by each employer-member of the group which could differ one from the other in all of their substantive terms. Bargaining of this fashion does not evidence the "employer solidarity" which was judged worthy of preservation in *Buffalo Linen*. There will be no "uniform agreement to administer"; no "standardization" of contractual terms; and no effort to present "a common front" to labor. In short, the integrity of the unit, which heretofore the Board and this Court have declared to be the foundation stone of multi-employer bargaining, is destroyed. All that remains is an effort on the part of employers to use what has the surface appearance of multi-employer bargaining as a device to withstand whipsawing. It is readily apparent, however, that without the unit's integrity the justification for the anti-whipsaw lock-out disappears, at least with respect to strikes which clearly have been called over issues withdrawn from group bargaining. Practical problems of great moment are created by the rationale which gives birth to this new concept of multi-employer bargaining. These problems, some of which are enumerated below, create an uncertainty and confusion that will disrupt the industrial peace now shared by millions of employees and thousands of employers in multi-employer units.[7] We wish to emphasize that without predictable and easily identifiable limits, informal multi-employer bargaining will be damaged, for the cost of bargaining failure in terms of legally un-

[7] For example, if an employer-member withdraws one mandatory subject, offers to bargain as to that subject, but insists at the very least upon obtaining the jointly negotiated contract in all other respects, would the union be guilty of refusing to bargain by its unwillingness to execute such a contract? Does the union have an option to insist upon the employer's total withdrawal from the unit, or does the union have to bargain with both the group as to

certain strikes and lock-outs is too high a cost to pay. We do not suggest that at each contract reopening employers and unions could not agree to bargain in this fashion consistent with the obligations imposed upon them by Sections 8(a)(5) and 8(b)(3) of the Act. We do submit, however, that such bargaining would constitute merely joint negotiation for the sake of the parties' convenience; it cannot support a finding of multi-employer bargaining as that phrase has been given meaning by *Truck Drivers* and the decisions of the Board.

2. The Board, as affirmed by the court below, plainly erred in holding that the 13 minor contract modifications in the past gave rise to the parties' implied intent to permit each employer to refuse to execute the jointly-negotiated contract and to insist instead upon individual negotiation of any term not to his liking. The Board and the Court ignored the following undisputed facts: 1) each of the modifications was negotiated after all employer-members had either executed uniform contracts or completed negotiations for uniform contracts; 2) in no instance did either the unions or any employer-member refuse to execute the jointly-negotiated agreement and insist upon separate negotiation of any modification; 3) whenever the parties could not agree to a modification, the uniform jointly-negotiated contract remained operative (J.A. 391, modification No. 3, 393, modification No. 13); and 4) most sig-

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group subjects and the individual employers as to withdrawn subjects, all the while bargaining with the group through the normal process of compromising or abandoning many of its demands in order to obtain agreement on the very subject which has been withdrawn? Would the withdrawal of a single subject by one employer cause other employers to be reluctant to bargain on that subject and thus ultimately break down free bargaining if more than one employer withdraws different subjects? What are the consequences of partial withdrawal on strikes and defensive lock-outs with respect to the withdrawing employer, the other employer-members, or the group at large? If partial withdrawal is permitted, may the employees of that employer constitute a separate appropriate unit?

nificantly, none of the modifications agreed to involved basic cost items such as wages, hours, or employees' benefits. In short, the modifications clearly evidence nothing more than an intent to make routine adjustments, by mutual consent, in order to tailor the joint agreement to special conditions which are not of general interest to all the employer-members of the group and which do not affect the competitive position of any member. None of the modifications decreased the cost of administering the contract to any single employer *vis-a-vis* the other members of the group, and thus did not create "competitive disadvantage resulting from non-uniform contractual terms" (*Buffalo Linen, supra,* at 96). Plainly, the modifications were merely housekeeping details and thus constituted accommodations accorded either to individual employers or to local unions to reflect isolated conditions of a specialized nature. In these circumstances, no warrant exists in the record for the Board to conclude that the parties' past conduct implied an intent to permit unilateral insistence upon separate negotiation of a basic cost item over the repeated protests of the union that all employer-members were bound by the results of the joint negotiation.

Routine contract adjustments are commonplace in the practice of multi-employer bargaining. See, for example, *Furniture Employees Council,* 96 NLRB 1002; *Hazel-Atlas Glass Co.,* 59 NLRB 706; *Cohn-Goldwater Mfg. Co.,* 55 NLRB 1164; *Fairbanks Dairy,* 146 NLRB 111. The court of appeals fell into error by concluding that the Board's decision promotes flexibility in bargaining and meets, on a case-by-case basis, problems of "infinite variety" (App. 10a-11a). To the contrary, flexibility is destroyed, for employers and unions will be required to forego individual contract adjustment of local, routine problems rather than risk undermining their mutually desired objective of substantive contract uniformity. In this respect, the Board's decision, if permitted to stand, may also impair the vitality of single-employer bargaining on a multi-plant basis where

there has been a long history of single plant negotiation of particular subjects in order to better reflect local conditions.

Moreover, the holding of the court below is contrary to the decision of the Ninth Circuit in *Pacific Coast Association of Pulp and Paper Manufacturers* v. *N.L.R.B.*, 304 F.2d 760 (C.A. 9). There, the local unions and the employer-members of a multi-employer group had negotiated over pensions at the local level for thirteen years without the subject ever having been bargained about during group negotiations. In 1959, the unions insisted upon group bargaining on pensions, but the association declined in reliance upon the past practices and understanding of the parties. The Ninth Circuit held that the multi-employer group could not collectively withdraw a mandatory subject of bargaining from joint negotiation and insist upon negotiation of the subject at the individual employer level. The court noted that multi-employer "bargaining cannot be bifurcated . . . unilaterally."[8] We submit that the decision of the court below presents a clear conflict between circuits. Unilateral insistence upon separate negotiation by a single employer is no more privileged than unilateral insistence upon individual bargaining by employer-members collectively.

3. Finally, even assuming that a prerogative was established by past practice, the court of appeals recognized that more than past practice alone was necessary to relieve Kroger of its bargaining obligation, but the court erred in concluding that Kroger had made a timely withdrawal of the pension issue (App. A, *infra*, pp. 8a-10a). The record clearly reflects that at the start of negotiations Kroger, as well as A & P, merely stated its lack of interest in, or opposition to, granting pensions and not that it withdrew the subject from joint bargaining. Kroger's position was

[8] In distinguishing *Pacific Coast* the court below erroneously regarded the case as merely one where the employers refused to recognize a subject as a mandatory subject of bargaining.

clearly the industry position for it was not until the twelfth bargaining session when the industry retreated from its position that Kroger made any statement indicating partial withdrawal. Until that time all the employers joined in either oral or written declarations, by virtue of their counter-proposals, that they opposed the inclusion of pensions in the contract. The Board's conclusion that opposition to a union demand evidences an intent to reserve a prerogative to insist upon separate negotiations is plainly erroneous.

We anticipate that the Solicitor General and the Board will oppose the granting of this petition. If such opposition occurs, it cannot be squared with their statements to the Court this term in *N.L.R.B.* v. *Brown*, certiorari granted, 32 L.W. 3243, No. 558. There, the Court has granted the Solicitor General's and the Board's petition for a writ of certiorari on their plea (Petition, p. 1.) that "although the precise issue is novel, the importance of multi-employer bargaining makes it desirable that this court promptly correct the misapplication of its decision in the *Truck Drivers* case." In *Brown*, the Solicitor General and the Board thought that the narrow question presented there called for review by the court because it will "determine one of the basic rules for multi-employer bargaining," and thus significantly affect the national labor policy. We submit that the issues presented here are at least of equal concern. The Board and the court below have radically departed from this Court's view of multi-employer bargaining as expressed in *Truck Drivers*. Anti-whipsaw lock-outs arise only after multi-employer bargaining has failed; the instant case presents a ready vehicle to clarify the rights and obligations of the parties while bargaining continues so that they might be better able to avoid the statutorily-declared evil of industrial unrest. In sum, what are the basic obligations of multi-employer bargaining needs clarification equally as much as the consequences of such bargaining upon lock-outs.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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